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SAN JOSE CA 95131

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**JUN 12 2006**  
**OFFICE OF PETITIONS**

In re Application of  
Legrand, et al.  
Application No. 10/069,741  
Filed: 26 February, 2002  
Attorney Docket No. FR000067

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ON PETITION

This is a decision on a petition filed on 29 November, 2005, under 37 C.F.R. §1.137(b).

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) is **GRANTED**.

**BACKGROUND**

The record indicates:

- Petitioner failed to reply timely and properly to the non-final Office action mailed on 19 April, 2005, with reply due absent extension of time on or before 19 July, 2005—it appears that Petitioner changed address, but did not Notice the Office in advance, and the mailing was returned undelivered;
- the application went abandoned by operation of law after midnight 21 July, 2005;
- Petitioner filed a Notice of Change of Address on 13 October, 2005—**a notation in the file indicates, however, that the attorney signing the Notice was/is not on the Power of Attorney of record;**

- it does not appear that the Office mailed the Notice of Abandonment before the instant petition was filed;
- on 29 November, 2005, Petitioner filed the instant petition, fee, reply in the form of an amendment, and made a statement of unintentional delay—thus, Petitioner appears to have satisfied the regulatory requirements under 37 C.F.R. §1.137(b).

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>1</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.<sup>2</sup>

Delays in responding properly raise the question whether delays are unavoidable.<sup>3</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>4</sup> And the Petitioner must be diligent in attending to the matter.<sup>5</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and

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<sup>1</sup> 35 U.S.C. §133 provides:

**35 U.S.C. §133 Time for prosecuting application.**

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

<sup>2</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>3</sup> See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 *Fed. Reg.* at 53158-59 (October 10, 1997), 1203 *Off. Gaz. Pat. Office* at 86-87 (October 21, 1997).

<sup>4</sup> See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

<sup>5</sup> See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 *Off. Gaz. Pat. Office* 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 *Off. Gaz. Pat. Office supra*.

regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>6</sup>))

Allegations as to  
Unintentional Delay

The requirements for relief under the provisions of 37 C.F.R. §1.137(b) are: petition, fee, reply, showing of unintentional delay, and—where appropriate—a terminal disclaimer and fee.

It appears that Petitioner has satisfied the requirements of the regulation.

CONCLUSION

Because Petitioner appears to have satisfied the regulatory requirements, regulation, the petition under 37 C.F.R. §1.137(b) is **granted**.

The application is released to the Examiner in Technology Center 2600 for further processing in due course.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.



John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

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<sup>6</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First-Named Inventor: LEGRAND

Application No.: 10/069,741 Conf.:

Date Filed: 02/26/2002

Docket No.: FR 000067

Art Unit: 2631

Examiner: Aghdam, F.

Title: DETECTION AND CORRECTION OF PHASE JUMPS IN A PHASE SEQUENCE  
PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT  
ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)

Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

RECEIVED  
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NOV 29 2005

Sir:

The above-identified application became abandoned for failure to file a timely and proper reply to a USPTO notice or action dated 04/19/2005.

## APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION.

*NOTE: A grantable petition requires: (1) Petition fee; (2) Reply and/or issue fee; (3) Terminal disclaimer w/disclaimer fee (IF filed before 6/8/1995); and (4) Statement that the entire delay was unintentional.*

## 1. PETITION FEE UNDER 37 CFR §1.17(m):

☒ Please charge the petition fee to Deposit Account 14-1270.

## 2. REPLY AND/OR FEE:

☒ The reply and/or fee to the above-noted Office Action in the form of Office Action Response and Amendment

☐ has been filed previously on \_\_\_\_.

☒ is enclosed herewith.

☐ The issue fee

☐ has been paid previously on \_\_\_\_.

☐ is enclosed herewith.

## 3. TERMINAL DISCLAIMER WITH DISCLAIMER FEE:

☐ Since this application was filed after June 8, 1995, no terminal disclaimer is required.

☐ A terminal disclaimer and the required disclaimer fee disclaiming the required period of time is enclosed herewith.

## 4. STATEMENT:

☒ The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional.

Please charge any fees which may be required, or credit any overpayment to Deposit  
Account No. 14-1270.

Date: 28 - NOV - 2005

Respectfully submitted,

By Peter Zawilski  
Peter Zawilski, Reg. No. 43,305  
(408) 474-9063  
Philips Electronics North America Corp.  
1109 McKay Drive MS41-SJ  
San Jose, California 95131

Enclosures: ☒ Fee Payment  
☒ Reply  
☐ Terminal Disclaimer Form  
☐ Additional sheets containing statements establishing unintentional delay  
☐ Other: \_\_\_\_\_

CERTIFICATE OF MAILING or TRANSMISSION	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage for first class mail in an envelope addressed to "Mail Stop Petitions, Commissioner for Patents, Arlington, VA 22313-1450," or being facsimile transmitted to the USPTO at (571) 273-8300, on the date indicated below.	
(Date) <u>11/29/05</u>	(Signature) _____ (Name) Daniel L. Michalek

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(Date) <u>11/29/05</u>	(Signature) <u>[Signature]</u> (Name) Daniel L. Michalek